

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1834 of 1986

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

GIRISHKUMAR R JANI

Versus

GEB

Appearance:

M/S NJ MEHTA ASSO. for Petitioner
MR KS NANAVATI for Respondent No. 1, 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 30/09/96

ORAL JUDGEMENT

Gujarat Electricity Board-respondent herein (hereinafter referred to as the "Board") on 26th December, 1973 issued a General Standing Order No. 253 (hereinafter referred to as "GSO 253"). Under the said order, a scheme was framed for grant of higher grade to the employees of the Board upon their completing 9 years' service in the same cadre or post in a particular pay-scale. The details of the working of the said scheme has also been provided in the said order. It has been

provided that an employee of the Board would be entitled to promotion to the next higher pay-scale from the date following the date on which he completes 9 years' service in the same cadre or post irrespective of the fact whether suitable vacancies in the next higher post are available or not. The benefit would be admissible provided that :

- (i) Such employee is otherwise fit for promotion on the basis of overall performance.
- (ii) He passed necessary examination prescribed by the Board, one of the examination being provisional examination prescribed for Junior/Deputy Engineers.

The petitioner was appointed as a Junior Engineer on 21.11.1966 and he completed nine years of service as Junior Engineer on 20.11.1975. Thus the petitioner became entitled for being considered for promotion to the higher grade under GSO 253 with effect from 21.11.1975. The petitioner was, however, not offered the benefits of GSO 253 on the date on which he completed nine years service or soon thereafter. The petitioner feeling aggrieved preferred Special Civil Application being Special Civil Application No. 71 of 1982 before this Court. During the pendency of the petition, petitioner was promoted to the higher grade under GSO 253 with effect from 1.1.1982 under the order made in the month of August, 1982. It is the grievance of the petitioner that petitioner was wrongly denied promotion to the higher grade from due date i.e. 21.11.1975. The petitioner has contended that an adverse remark made in his service record for the years 1974-75 which was not communicated to the petitioner till the year 1979 has been considered by the Board and solely relying on one adverse remark, the petitioner has been denied the benefit of the higher grade. It is his case that his case for higher grade has not been considered in accordance with the provisions made in GSO 253.

Special Civil Application No. 71 of 1982 and other several petition filed by the employees of the Board came up for hearing before this Court (Coram: S.A.. Shah, J.) on 18.6.1984. The court considered the provisions made in GSO 253 and issued directions to reconsider the case of each of the petitioner keeping in view the observations made and the directions issued by the Court. Pursuant to the said directions, petitioner's case for grant of higher grade with effect from

21.11.1975 was reconsidered and under communication dated 7.12.1984 the petitioner was informed that the higher grade given to the petitioner with effect from 1.1.1982 was proper and the same did not call for any alternation. It is this communication which is the subject matter of challenge in this petition.

The learned Advocate Mr. Master has appeared for the petitioner and has contended that the overall performance of the petitioner for a period of nine years has not been considered by the respondent-authority. He has further contended that the adverse entry for the year 1974-75 which was communicated belatedly has been considered and an undue weightage has been given to such an adverse entry. He has relied upon the judgment of the Supreme Court in the matter of Gurdial Singh Fijji vs. State of Punjab and Others. [AIR 1979 SC 1622]. He has particularly relied upon paragraph -17 of the judgment and has contended that in view of the belated communication of the adverse entry for the year 1974-75, the petitioner lost chance of improvement and in view of the delayed communication, the said entry ought to have been ignored by the Board. He has also contended that the observations made by this Court in the earlier petition has not been taken into consideration while reconsidering the case of the petitioner. Mr. Master has contended that GSO 253 requires that an employee should be otherwise fit for promotion on the basis of overall performance. He has made a grievance that criteria for promotion to the post of Deputy Engineer i.e that of seniority-cum-merits has not been applied while considering the case of the petitioner for grant of higher grade. He has submitted that in view of the judgment of this court in the matter of Dr. BR Kulkarni vs. State of Gujarat, 19 GLR p. 1021 and in the matter of DB Shah and Ors. vs. State and Anr. (1983) 1 GLR 319; the test to be applied for considering the case on the basis of the seniority-cum-merits is that of positive unfitness. Unless the Selection Committee considered an employee to be positively unfit his claim for promotion cannot be refused. Applying the same test, the petitioner's service record ought to have been considered and unless the Selection Committee considered the petitioner positively unfit for promotion to the post of Deputy Engineer, he ought not to have been refused the benefits of higher grade. He has submitted that in the present case, the Board has failed to consider the overall performance of the petitioner and has failed to apply correct test for such consideration. He, therefore, submits that Board's decision to confer benefits of higher grade upon the petitioner with effect

from 1.1.1982 is erroneous and the petitioner ought to have been given the benefits of such higher grade with effect from the due date i.e. 21st September, 1975.

The petitioner has preferred a writ petition in the same subject matter earlier and the same has been decided by this Court on 18th June, 1984. All the contentions raised in this petition were also raised before the Court earlier and the same have been examined and decided. The only question, therefore, that arises for the consideration by this court is whether at the time of reconsideration the observations made and the directions issued by the court earlier are scrupulously followed or not.

It is not disputed that the criteria for promotion to the higher post is that of seniority-cum-merits and that the same test would apply for consideration for grant of higher grade also. It is also not disputed that the test of positive unfitness is required to be applied while considering the case for grant of higher grade. The question whether the adverse entry made for the year 1974-75 in the service record of the petitioner ought to have been considered or not remains to be examined. The precise issue was raised before this Court earlier. The court considering the rival contentions and after examining the several judgments cited before it held that "it appears from the aforesaid reliefs, that in such a situation, proper relief is to direct the authority to dispose of the representation and, thereafter to direct the selection committee to review its decision and give benefits from the due date." The contention raised on behalf of the petitioner that an adverse entry which was not communicated should be totally ignored from consideration did not find favour with the learned Judge. Thus, the said contentions having been refused once, the same cannot be reagitated again in this petition. The petitioner's contention that the adverse entry made in the service record for the year 1974-75 should be ignored requires to be rejected.

The learned Judge after considering all the contentions raised by the parties, gave final conclusion for being followed by the Board. The relevant conclusion for the parties considering this writ petition are as under:

- (1) For the promotion to the next higher grade/post the criteria is:

- (a) Seniority-cum-merits for post carrying salary less than Rs 1,300/ per month;
- (b) Overall performance shall mean performance of an officer for all the 9 years prior to due date of consideration to higher grade/post.
- (c) Confidential Records subsequent to the due date of consideration cannot be taken into account.
- (d) Adverse remarks of 3 years prior to due date of consideration, if not communicated, should be treated as stale and belated and should be ignored for consideration.
- (e) The Board will have to communicate the remarks for the period of three years prior to the due date of consideration, if it intends to rely upon the same, and invite representation which may be considered before reassessment.

After drawing the aforesaid conclusion, the court proceeded to direct the Board to reconsider all the cases for grant of benefits under GSO 253 in accordance with the observations made by the Court.

The adverse entries made in the service record of the petitioner for the year 1974-75 was communicated to the petitioner in the year 1979 against which the petitioner has preferred an appeal. The appeal of the petitioner was rejected in the year 1980. Thus, the said adverse entry has become final. Mr Master has relied upon the above referred conclusion (d) and has submitted that the adverse entries for the year 1974-75 ought to be ignored. I am afraid, I cannot accept the contention raised by Mr. Master. The said conclusion clearly states that any adverse entry made for the year three years prior to the due date of consideration should be considered stale and belated and should be ignored. It is undisputed that the due date of the consideration so far as the petitioner is concerned, is 21st November, 1975, the adverse entry was made for the year 1974-75, therefore, it cannot be said to have been made for the year, three years prior from the date of the consideration, therefore, the same cannot be ignored. In

the above referred conclusion (e) the Court has clearly directed that uncommunicated adverse entry should be communicated and representation against such entry should be considered before the reassessment. Thus, adverse entries could be considered only after they were communicated and representation against such entry is considered before reassessment. It is not in dispute that the above referred adverse entry was communicated to the petitioner and his appeal against the same was considered by the Board prior to reassessment. The Board's action in relying on the said adverse entry cannot be said to be contrary to the directions issued by the Court earlier.

The question that now requires to be considered is whether the Board while reconsidering the case of the petitioner took into consideration overall performance of the petitioner and applied the correct test of seniority-cum-merits as directed by the court earlier.

A counter affidavit has been filed by the Industrial Relations Officer of the Board. It has been denied that the overall performance of the petitioner was good. It has been stated that there were adverse entries in the service record of the petitioner for the years 1974-75, 1976-77 and 1977-78. The petitioner was, therefore, considering his service record for the year 1979-80 and 1980-81 was offered higher grade with effect from 1.1.1982. Though, it has been denied that the petitioner's overall performance was good, the Board has not stated as to whether while reconsidering the case of the petitioner the overall performance of the petitioner was examined by the Selection Committee or not. It is obvious that while considering the petitioner's case for higher grade with effect from November, 1975, the service record for the year 1976-77 and 1977-78 could not have been taken into consideration. The Board has failed to establish that the Board had examined the overall performance of the petitioner for the period of 9 years prior to the due date i.e. 21.11.1975. I am, therefore, constrained to hold that the Board has failed to reassess the case of the petitioner in accordance with the directions issued by this Court in the earlier petition. In that view of the matter, the petition requires to be allowed.

I, therefore, direct that the petitioner be given benefits of the higher grade on completion of 9 years service as Deputy Engineer i. e. with effect from 21.11.1975. The petitioner shall be entitled to all the

consequential benefits of difference of salary and the benefits of seniority in accordance with paragraph-3 of GSO 253. If in view of his placement, petitioner becomes entitled to absorption on regular vacancy earlier than his actual absorption. The same shall be considered in accordance with law. The aforesaid exercise shall be completed within six months from the date of receipt of copy of this order. Rule is made absolute with costs.
